NICHOLAS MAZIVANAN v. PP

HIGH COURT MALAYA, IPOH
MOSES SUSAYAN JC
[CRIMINAL APPEAL NO: AA-41(ORS)(A)-1-11-2022]
31 JULY 2024

Abstract – *Section 254 of the Criminal Procedure Code ('CPC') bestows upon the Public Prosecutor, under art. 145 of the Federal Constitution, the prosecutorial power to discontinue a criminal prosecution at any stage of the trial. However, the court must then decide whether to discharge or acquit the accused, as outlined in s. 254(3) of the CPC. While the Attorney General's ('AG') decision to stop the prosecution influences the trial's course, the court retains the authority to make the final judicial order. The AG's role does not extend to influencing the court's decision on discharging or acquitting the accused, thus fortifying the court's judicial independence.*

CONSTITUTIONAL LAW: *Public Prosecutor – Powers – Prosecutorial power – Whether prosecutorial discretion of Public Prosecutor absolute – Federal Constitution, art. 145 – Criminal Procedure Code, s. 254*

CRIMINAL PROCEDURE: *Appeal – Appeal against decision of Magistrates' Court – Accused charged under s. 354 of Penal Code – Offence of outraging modesty – Magistrate fixed few mention dates for prosecution to wrap up investigation and proceed with trial – Prosecution requested for multiple adjournments and postponements on reason of incomplete investigation – Prosecution did not proceed with trial even though accused had been charged for two years – Magistrate ordered discharge not amounting to acquittal – Whether proper order – Whether prosecution's reason of awaiting further investigation good ground for Magistrate to order discharge not amounting to acquittal – Whether accused ought to be discharged and acquitted – Whether appeal against Magistrate's decision premature – Whether order of discharge amounting to acquittal could be given prior to commencement of trial – Criminal Procedure Code, ss. 173, 254 & 307(1)*

The appellant, a doctor, was charged at the Magistrates' Court under s. 354 of the Penal Code, for the offence of outraging the modesty of a patient. The chronological narration of the facts revealed that a few mention dates were given by the Magistrate for the respondent ('prosecution') to wrap up their investigation and proceed with the trial but that was not forthcoming from the prosecution. The Magistrate then fixed the case for trial on 24 June 2022 and gave a stern direction to revert with instruction from the Attorney General Chambers ('AGC') on the appellant's representation. The Magistrate also gave a mention date to update the court on the AGC's

instruction but the prosecution failed to do so. A new trial date was fixed on 16 August 2022 and, again, postponed to 14 October 2022. Despite the stern direction by the Magistrate, the prosecution, on the return trial date, did not want to proceed with the trial and, instead, requested for an adjournment on the same reason of incomplete investigation. The Magistrate allowed the adjournments and gave a similar stern direction. However, on 14 October 2022, the prosecution requested for another postponement, stating that the investigating officer was still in the midst of completing the investigation. The appellant objected to the prosecution's request for postponement and sought a discharge and acquittal for the appellant, pursuant to s. 254 of the Criminal Procedure Code ('CPC'). The Magistrate opted for a discharge not amounting to an acquittal ('DNAA') based on his analysis of: (i) s. 254(3) of the CPC that a discharge does not automatically lead to an acquittal unless specifically ordered by the court; (ii) s. 173(f) and (g) of the CPC that a Magistrate cannot acquit without hearing the prosecution's case on merits, except in specific circumstances, which he concluded was not present in this case. Hence, the present appeal. The issues that arose for determination were: (i) whether the appeal against the decision by the Magistrate was premature by reason of s. 307(1) of the CPC and s. 3 of the Courts of Judicature Act 1964 because the DNAA was not final and therefore not appealable; (ii) whether an order of discharge amounting to acquittal ('DAA') could be given prior to the commencement of the trial under s. 254 of the CPC; and (iii) whether the prosecutorial discretion of the Public Prosecutor, under s. 145(3) of the Federal Constitution ('FC'), was absolute.

Held (allowing appeal):

(1) Although the complaint could be heard by way of an appeal, the injustices to the appellant compelled the present court to exercise its inherent revisionary powers to review the Magistrate's decision in ordering DNAA. (para 18)

(2) Section 173(g) of the CPC allows a Magistrate to discharge an accused if the charge is considered groundless at any stage before the case's conclusion but it does not equate to discharge with acquittal. Section 254 of the CPC is concerned with scenarios where the court may discharge an accused and this discharge can amount to an acquittal if the prosecution is not prepared to proceed. This provision grants the court the discretion to end the case in favour of the accused without the need for a full trial, particularly in situations where the prosecution lacks readiness or evidence to support their case against the accused. This is a significant distinction from s. 173(g) of the CPC, emphasising the statutory provision for protecting the accused's rights against undue delays or lack of evidence in prosecution. The Magistrate had misinterpreted s. 254 of the CPC. There was an inadequacy and lack of thoroughness in the investigation for nine months. During this period,

numerous adjournments were sought by the prosecution. Despite the Magistrate grudgingly allowing the adjournment with stern direction that, on the next date, the trial must begin, the prosecution was never ready. What the prosecution had was a premature charge, without a thorough investigation, leaving them in a prolonged state of uncertainty. There was also the prosecution's lack of preparedness for trial which was evident from the absence of any witnesses, including the complainant, on the trial dates. Being charged without the proof of guilt caused the appellant and his family considerable mental distress. This was further compounded by the financial burden of defending against the charge. The appellant, a Government doctor with a family, had fully cooperated with the investigation and had endured over two years of hardship trying to clear his name while the prosecution repeatedly sought adjournments for apparently the same reasons. After enduring nearly two years of uncertainty and distress, the issuance of the DNAA order was a grave injustice to the appellant and did not change the society's perception of his guilt. The threat of being re-charged also continued to loom over the appellant's head. (paras 23-24 & 28-32)

(3) Pursuant to s. 254 of the CPC, the Public Prosecutor has the power to discontinue any criminal prosecution at any stage of the trial, as provided by art. 145 of the FC. However, the ultimate authority to decide whether to discharge or acquit an accused lies solely with the court. This discretion must be exercised judiciously to prevent any injustice, particularly in cases where the prosecution is unprepared or delays unduly. Given the circumstances of this case, it was appropriate to order a DAA, substituting the order of the Magistrates' Court, to uphold the principles of justice and judicial independence. (para 38)

Case(s) referred to:

Ahmad Zubair Hj Murshid v. PP [2014] 9 CLJ 289 FC ***(refd)***
Benjamin William Hawkes v. PP [2020] 8 CLJ 267 FC ***(refd)***
Dato' Gee Siew Yee v. PP [2020] CLJU 1237; [2020] 1 LNS 1237 HC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458, [1991] 1 CLJ (Rep) 183 SC ***(refd)***
Karpal Singh Ram Singh v. PP [2012] 5 CLJ 537 FC ***(refd)***
Koh Teck Chai v. PP [1967] CLJU 72; [1967] 1 LNS 72 HC ***(refd)***
Manokaran & Anor v. PP [1978] CLJU 118; [1978] 1 LNS 118 HC ***(refd)***
PP v. Lee Chan Sang [1989] 1 CLJ 144; [1989] 1 CLJ (Rep) 139 SC ***(refd)***
PP v. Lew Koy [2002] 1 CLJ 86 HC ***(refd)***
PP v. Mohamed Ali Sani [1977] CLJU 100; [1977] 1 LNS 100 HC ***(refd)***
PP v. Mohamed Said [1982] CLJU 115; [1982] 1 LNS 115 HC ***(refd)***
PP v. Syed Abdul Bahari Shahabuddin [1975] CLJU 137; [1975] 1 LNS 137 HC
PP v. Tan Kim San [1980] CLJU 66; [1980] 1 LNS 66 HC ***(refd)***
PP v. Zainuddin Sulaiman & Ors [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 SC ***(refd)***
Raqeem Rizqin Enterprise & Yang Lain lwn. Ketua Polis Negara & Satu Lagi [2019] 8 CLJ 41 FC ***(refd)***

A *Sheila Sharon Steven Kumar v. PP [2023] CLJU 2776; [2023] 1 LNS 2776 HC* ***(refd)***
Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199 FC ***(refd)***
Tan Chow Cheang v. PP [2018] 6 CLJ 452 CA ***(refd)***
Vigny Alfred Raj Vicetor Amratha Raja v. PP [2022] 8 CLJ 1 FC ***(foll)***

B **Legislation referred to:**
Courts of Judicature Act 1964, ss. 3, 31, 35
Criminal Procedure Code, ss. 172B(4), 173(f)(ii), (g), 254(3), 254A, 307(1), 323, 376, 377(a)
Federal Constitution, s. 145(3)
Penal Code, s. 354

C *For the appellant - Gurbachan Singh Bagawan Singh; M/s Sandeep Gobindeep & Co*
For the respondent - Geetha Jora Singh; DPP

Reported by Najib Tamby

D **JUDGMENT**

Moses Susayan JC:

Introduction

[1] An accused is innocent until proven guilty, and in the same vein, the
E constitution provides that a person cannot be deprived of his freedom, save in accordance with the law. But when these two principles come into apparent conflict, which shall prevail? This case addresses one such situation. The appellant, without fail, appeared in court on all court appearance dates including trial dates to prove his innocence but never got to do so because
F the trial was adjourned until the day when the appellant was discharged, not amounting to an acquittal. The appellant fought vehemently for a discharge amounting to an acquittal, but the Magistrate refused. As a consequence of this, is it fair for society to frown upon the appellant with a guilty look because he has not proven his innocence and is it just for the appellant to wait for an indefinite period to be re-charged?

G **Background Facts**

[2] The appellant, a doctor who pleaded not guilty to the charge under s. 354 of the Penal Code, for outraging a patient's modesty. The appellant appeared in the Magistrates' Court Manjung for all the mention and trial
H dates over a span of one year, 11 months, and 14 days to vindicate himself of the charge. However, on 14 October 2022, it was ordered that he be discharged not amounting to acquittal (DNAA) despite his request for a discharge amounting to acquittal (DAA). Dissatisfied with the decision the appellant appeals against the Magistrate's decision to this court, seeking to
I overturn the DNAA order and replace it with a DAA order on the basis that the Learned Magistrate failed to apply s. 254 of the Criminal Procedure Code

(CPC) in its true spirit on the face of the facts in this case. It must be emphasised here that the application before the Magistrate by the appellant for DAA was pursuant to s. 254 of the CPC not under s. 173 of the CPC.

[3] At the outset, I must also state that the reason given by the prosecution to the court for not being able to proceed with trial was the same for all requests of postponement by them of the trial. The reason was that the Attorney General's Chambers (AGC) had directed further investigations on the representation by the appellant to the AGC. The same reason was given for the adjournments sought despite the Magistrate giving specific direction to proceed with trial, with or without any outcome on the representation. This is what the Magistrate said about the prosecution's reason for adjournment and application pursuant to s. 254(3) of the CPC made by the appellant to move the court for the DAA on 14 October 2022:

> Majistret: Ini keputusan saya. Sebelum ini saya sudah memberitahu yang kita akan jalankan kes walaupun keputusan reprentasi belum diterima memandangkan kes ini pun sudah lebih setahun dan masih belum seorang saksi pun yang dipanggil. Walaupun Pihak pembelaan sebentar tadi telah berhujah bahawa seksyen 254(3) Kanun Acara Jenayah berikan budibicara kepada Mahkamah untuk membebaskan OKT. Namun, mahkamah ini merujuk kepada kes Mahkamah Persekutuan di dalam kes *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v. Public Prosecutor* [2014] 6 MLJ 831 telah dengan tegasnya menyatakan budi bicara ini tidak diberikan kepada Mahkamah Rendah iaitu Majistret ataupun Hakim Sesyen dan hanya diberikan kepada Mahkamah Tinggi sahaja kerana dilihat akan menceroboh masuk ke dalam budibicara Pendakwa Raya yang dijamin oleh Perlembagaan Persekutuan." (see Record of Appeal encl. 10 at pg 15)

[4] This appeal hinges on the facts and circumstances of the case concerning the application of s. 254 of the CPC.

Facts

[5] It is pivotal to have full appreciation of the facts of the case for the purposes of this appeal. On 24 May 2021, the prosecution charged the appellant under s. 354 of the Penal Code for an alleged offence committed on 31 October 2020. This charge pertains to a supposed act of violence intended to outrage an individual's modesty.

[6] As in the usual course of most criminal matters, the appellant here had submitted a representation to the AGC, and multiple court mentions dates were obtained between January and October 2022. Append below the chronology of the events as set out by the appellant in his submission since the submission of representation:

(i) on 26 January 2022, the appellant's solicitors sent a representation to the AGC, which was mentioned in court on 27 January 2022. The court then fixed a next mention date on 25 February 2022, for the outcome on the representation made to the AGC;

A (ii) on 25 February 2022, the Deputy Public Prosecutor (DPP) informed the court about receiving the representation from the appellant and had passed along a detailed briefing to the State Prosecution's Director. As a result, the court fixed a next mention date for 18 March 2022;

B (iii) on 18 March 2022, the DPP sought to have another date set for mention since the investigation papers remained with the State Prosecution's Director, who had yet to provide feedback on the appellant's representation. The Magistrate, acknowledging the delay, scheduled another mention date on 31 March 2022, indicating that a C trial date would be fixed should there be no forthcoming response;

(iv) on 31 March 2022, the DPP informed the Magistrate that the investigation papers had reached the headquarters, which, however, had not issued any reply regarding the representation. This led to the Magistrate to fix another mention date on 28 April 2022, to review D the status update and a trial date was fixed on 23 Jun 2022 (at the request of the appellant's solicitor, the trial date was rescheduled to 24 June 2022);

(v) on 28 April 2022, the DPP updated the court that the case was still E with the State Prosecution's Director and there had been further instructions to the investigating officer. As such, the court fixed another mention date on 13 May 2022, and the trial date was maintained on 24 June 2022;

(vi) on 13 May 2022, the defence counsel informed the court that they had F sent a reminder to the AGC on the representation. The DPP briefed the Magistrate that the AGC had called for additional investigations, leading to the case being reviewed again, this time involving the State Prosecution's office in Ipoh and ultimately the headquarters in Putrajaya. The court maintained the trial date on 24 June 2022;

G (vii) on 24 June 2022, the trial was postponed due to the defence counsel falling ill. As for the update on the representation, the DPP informed the court that there was no response yet from headquarters. A new trial date was fixed on 16 August 2022;

(viii) on 16 August 2022, the DPP was still not prepared for trial, they H informed the Magistrate that the sexual crime unit in Putrajaya had yet to respond and that the headquarters had revisited the investigation papers, issuing new instructions to the investigating officer for further action. A request was made by the DPP to postpone the trial, leading to the Magistrate instructing all parties to ready themselves for the I trial on 14 October 2022;

(ix) on 14 October 2022, the expected commencement of trial did not take place, the DPP informed the Magistrate that the sexual crime unit in Putrajaya was still reviewing the representation and that the DPP had only recently received the investigation papers, indicating the need for an additional, fourth time investigation. The investigating officer was still in the midst of completing the new direction to be sent back to headquarters. In response, the defence counsel submitted for DAA of the appellant, citing relevant authorities. The prosecution insisted on an adjournment or at the very least to order DNAA, the Magistrate opted for DNAA. The exact words of the Magistrate in the grounds of judgment were as follows:

> [4] Pada 14 Oktober 2022, peguambela tertuduh hadir dan bersedia untuk menjalankan kes bicara walaupun representasi mereka masih belum mendapat kata putus dari pihak AGC. Namun, TPR memaklumkan tidak bersedia untuk menjalankan perbicaraan kerana tidak sapina saksi dan tiada saksi yang hadir pada tarikh berkenaan. TPR masih memohon mahkamah memberikan penangguhan terakhir untuk jawapan representasi. Peguambela yang bijaksana telah berhujah memohon agar tertuduh dilepas dan dibebaskan (DAA) daripada pertuduhan selari seksyen 254 atau seksyen 173(f) Kanun Prosedur Jenayah (KPJ) memandangkan pihak pendakwaan tidak bersedia untuk perbicaraan disebabkan oleh siasatan yang belum selesai. *TPR membantah permohonan pembelaan dan masih memohon tarikh akhir untuk sebutan jawapan representasi ataupun tertuduh hanya dilepaskan tanpa dibebaskan (DNAA).*
>
> (emphasis added)

(x) thereafter, the appellant filed an appeal against the Magistrate's decision, which came before this court for disposal.

[7] As at the date that this court pronounced its decision, the prosecution has not taken steps to re-charge the appellant after the order of DNAA. Despite the DPP's position that they were waiting for the appeal's resolution, this stance misses legal reasoning. On the one hand, as the prosecution requested, the Magistrate had granted DNAA. This was essentially to allow them to complete the investigation and re-charge the appellant. There was nothing hindering them from doing so because there was no stay order preventing prosecution. Had the prosecution proceeded to recharge, there is a possibility of the appellant applying for a stay order pending the conclusion of this appeal, in which case the prosecution could graciously concede to the stay pending the resolution of this appeal. As this was not the case here, this court can only conclude that the prosecution was not ready to re-charge the appellant up to the date this appeal concluded in this court.

A **Decision Of The Learned Magistrate**

[8] The learned Magistrate's decision focuses on the interpretation of the provisions of the CPC. The Magistrate explored the interpretation of 'shall' in s. 172B(4) of the CPC, concluding that it does not impose a strict three-month deadline for starting a trial after a charge, which he construed relying B on the Federal Court's decision in *Benjamin William Hawkes v. PP* [2020] 8 CLJ 267; [2020] 5 MLJ 417; [2020] 5 MLRA 615. Though the word "shall" in the section does not inherently make a provision mandatory following the principle set out in *Benjamin William* (*supra*), however, this court is of the view that this provision is significant, implying that after three C months, the aging of the case mandates that any requests for adjournment must be accompanied by valid justification. This is essential to mitigate potential prejudice to the accused, whose constitutional right to a timely trial and the opportunity to establish innocence could be compromised by undue delays.

D **[9]** Next, the learned Magistrate deliberated on whether the appellant should be DAA when repeatedly informed of the ongoing investigation as the reason for adjournment of trial after the charge. The Magistrate considered this point, having in mind the case of *PP v. Tan Kim San* [1980] CLJU 66; [1980] 1 LNS 66; [1980] 2 MLJ 98; [1980] 1 MLRH 450, which criticized E the practice of "arrest first, investigate later". The learned Magistrate found substantial differences with the present appeal, where the prosecution's further investigation followed by the defence's representation to the AGC was not indicative of an incomplete initial investigation. Learned counsel for the appellant submits otherwise, that the representation was only made once, F at the very early stage of the proceeding on 26 January 2022 and there was no subsequent representation. However, since then, it is the prosecution who had been requesting numerous adjournments, all of which were on the basis of wanting to complete their investigation based on the representation made by the appellant. It is clear from the chronological narration of the facts G above, there were a few mention dates given for the prosecution to wrap up their investigation and proceed with the trial, but that was not forthcoming from the prosecution. Hence on 31 March 2022, the Magistrate fixed the case for trial on 24 June 2022 and gave a stern direction to revert with instruction from the AGC on the representation. The Magistrate also gave a mention date to update the court on the AGC's instruction, but the prosecution failed H to revert on the instruction. Then, a new trial date was fixed on 16 August 2022 and again postponed to 14 October 2022, all to facilitate the prosecution. Despite the stern direction by the court, the prosecution on the return trial date did not want to proceed with the trial and instead requested for an adjournment on the same reason of incomplete investigation. The I Magistrate had, despite the appellant disagreement, allowed the adjournments giving similar stern direction. However, on 14 October 2022, when the prosecution requested for postponement stating the investigating

officer was still in the midst of completing the investigation, which in response, the defence counsel objected and submitted at length for a discharge and acquittal of the appellant, the Magistrate opted for a discharge not amounting to an acquittal.

[10] In his analysis of s. 254(3) of the CPC, the Magistrate emphasised that a discharge does not automatically lead to an acquittal unless specifically ordered by the court. Further, the Magistrate interpreted ss. 173(f) and (g) to mean that a Magistrate cannot acquit without hearing the prosecution's case on merits, except in specific circumstances, which he concluded was not present in this case. As I have stated earlier, the appellant had made his position very clear that his application for DAA is based on s. 254 of the CPC and not pursuant to s. 173. Therefore, s. 173 of the CPC has no relevance to the determination of the case before this court. Although some discussion pertaining to s. 173 is considered in this grounds of judgment.

[11] Section 254 of the CPC reads as follows:

> Public Prosecutor may decline to prosecute further at any stage
>
> (1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
>
> (2) At any stage of any trial before a Sessions Court or a Magistrates Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.
>
> (3) Such discharge shall not amount to an acquittal unless the Court so directs.

Issues For Determination In The Appeal

[12] The issues as set out by the respondent in their submission are as follows.

(i) that the appeal against the decision by the Magistrate, is premature by reason of s. 307(1) of the CPC and s. 3 of the Court of Judicature Act 1964, because the DNAA order is not final and therefore, not appealable;

(ii) that no order of "DAA" can be given prior to the commencement of the trial under s. 254 of the Criminal Procedure Code; and

(iii) is prosecutorial discretion the absolute discretion of the Public Prosecutor under art. 145(3) of the Federal Constitution?

A **Issue 1: Order For DNAA Is Not Appealable**

[13] The respondent's first challenge to the appellant's appeal centres on the appealability of the DNAA order issued by the Magistrate. The learned DPP argues that the DNAA order is not a final order because it does not conclusively resolve the rights of the parties involved, as there is a possibility B of the accused being re-charged, and as such, it does not meet the criteria of a final decision that can be appealed. Section 307(1) of the Criminal Procedure Code, permits only appeals against final judgments, sentences, or orders that dispose of the parties' rights.

C **[14]** Supporting this view, the learned DPP references s. 3 of the Court of Judicature Act 1964, which defines a decision as one that finally disposes of the rights of the parties. This definition has been upheld in several cases, including *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537 and *Ahmad Zubair Hj Murshid v. PP* [2014] 9 CLJ 289, where interlocutory orders that do not resolve the parties' rights were deemed non-appealable. Similarly, in *Tan* D *Chow Cheang v. PP* [2018] 6 CLJ 452; [2017] MLRAU 438; [2018] 5 MLJ 411; and *Dato' Gee Siew Yee v. PP* [2020] CLJU 1237; [2020] 1 LNS 1237; [2020] MLJU 1342, the courts have held that a DNAA is not a final decision as it allows for the possibility of the prosecution continuing. Similarly, in *Karpal Singh Ram Singh v. PP* [2012] 5 CLJ 537, it was held that parties are E not denied the right to appeal, but such an appeal should be made after the conclusion of the trial. Therefore, based on these authorities, the respondent submits that the DNAA order is not a final order, making the present appeal incompetent and subject to dismissal without examining the merits.

F **Appellant's Response**

[15] At the outset, learned counsel for the appellant argues that if the respondent feels strongly that the reference process by way of an appeal is wrong, they ought to have filed an application to strike out the appeal.

[16] It is the appellant's contention by reliance on the case of *Vigny Alfred* G *Raj Vicetor Amratha Raja v. PP* [2022] 8 CLJ 1; [2022] 6 MLRA 1, in which it was also an appeal against DNAA and the argument of the decision to order DNAA cannot be appealed because it is not final was also raised. In the reasoning of Justice Mary Lim (FCJ), she held that DNAA is a final order because s. 254(3) of the CPC states that a discharge automatically H amounts to an acquittal unless it explicitly directs otherwise. Justice Mary Lim reiterates that the court must clearly state if the discharge does not amount to an acquittal. Her Ladyship further states, introducing the new amendment in s. 254A, which allows for trial reinstatement under specific conditions, does not negate the finality of a DNAA. Therefore, unless the court specifies that the discharge does not amount to an acquittal, the default I position is that it is a final order. Though this reasoning by Justice Mary Lim, on the discharge automatically by default amounts to an acquittal unless

it explicitly directed otherwise, is disagreed by the majority decision of Justice Zabariah Yusof (FCJ). Nevertheless, the decision to allow the appeal by setting aside the DNAA and to replace it, DAA was unanimous. It is for this reason, it cannot therefore, as of convenience, be said that the decision of the Magistrate to DNAA was not appealable. The decision in *Vigny Alfred* (*supra*) is by the Federal Court and it is as at the date this court delivered the decision the most recent case and is binding upon this court.

[17] Be that as it may, counsel on both sides acceded that this court is vested with the revisionary jurisdiction to review the complaint forming the basis of the appeal. The exercise of revisionary jurisdiction is pursuant to s. 323 of the CPC read together with ss. 31 and 35 of the Courts of Judicature Act 1964 (Act 91) ('the CJA'), which governs the jurisdiction of this court to review the decisions of the subordinate courts. This court can use these powers to address the complaint of injustice if circumstances warrant it. Further, even if the complaint is brought before the court by an appeal, this court can still exercise its powers of revision and make the necessary orders despite being precluded by other provisions in the Criminal Procedure Code from hearing the matter on appeal. The authority for this proposition is found in the decision by His Lordship Abdoolcader J in *Manokaran & Anor v. PP* [1978] CLJU 118; [1978] 1 LNS 118; [1979] 1 MLJ 262; [1978] 1 MLRH 58, I quote the relevant passage from the decision:

> I have however not only extensive power of revision in criminal proceeding of s. 325 of the Criminal Procedure Code but even wider powers conferred by s. 35 of the Courts of Judicature Act, 1964, and the Deputy Public Prosecutor agrees that in a case like this where there is an appeal against conviction on a plea of guilty it is open to me to deal with the conviction in the exercise of my powers of revision if the circumstances of the case so warrant. I would merely add that, in my view notwithstanding the provisions of s. 305 of the Criminal Procedure Code an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity.
>
> It is true that the matters complained of in this appeal have been brought to my notice by way of a record of appeal and the proceedings before me are headed in the criminal appeal, but, as I pointed out to counsel on both sides at the outset of this hearing, *it is nevertheless open to me notwithstanding this to exercise my powers of revision in this matter, and I referred in this regard to the decision of the Privy Council in In re Chunbidya & Ors. to the effect that when the High Court has before it on appeal a record of criminal proceedings, it can proceed to exercise its powers of revision if it chooses to do so and make the requisite order although precluded by an- other provision in the Criminal Procedure Code from doing so in the appeal*.
>
> (emphasis added)

A **Finding Of The Court**

[18] Although the complaint can be heard by way of an appeal relying on the Federal Court's decision in *Vigny Alfred* (*supra*), the injustices to the appellant in this case compels me to exercise the court's inherent revisionary powers to review the Magistrate's decision ordering DNAA.

B

Issue 2: That No Order Of "DAA" Can Be Given Prior To The Commencement Of The Trial Under Section 254 Of CPC Respondent's Submission

[19] The respondent submits that under s. 173(f)(ii) of the Criminal C Procedure Code, a Magistrate can only DAA the appellant if the prosecution fails to establish a *prima facie* case, which necessitates hearing the prosecution's evidence. In this case, since no witnesses have been called and the trial has not commenced, the respondent argues that the Magistrate cannot order DAA. Supporting this argument, several cases are cited: D *PP v. Zainuddin Sulaiman & Ors* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232; [1986] 2 MLJ 100, which states that acquittal requires either after hearing all prosecution evidence or the prosecution offering no further evidence; *PP v. Lew Koy* [2002] 1 CLJ 86; [2001] 4 MLRH 414, reaffirms that without hearing evidence, a Magistrate cannot order DAA, and the only appropriate E order that can be made is DNAA in any circumstances; and *PP v. Mohamed Ali Sani* [1977] CLJU 100; [1977] 1 LNS 100; [1978] 2 MLJ 109; [1977] 1 MLRH 7, which illustrates that an acquittal without hearing all prosecution witnesses amounts to a serious error and requires a retrial.

[20] The final case referred to by the respondent was the Supreme Court F case of *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458, [1991] 1 CLJ (Rep) 183; [1991] 1 MLRA 96, where it held that the right to appeal is not denied to the aggrieved party. They can appeal after the trial concludes if they feel aggrieved by a ruling made during the trial. The court explained that a "decision" under s. 3 of the Court of Judicature Act ("CJA") does not G include interlocutory judgments or orders, which do not finally dispose of the parties' rights. Therefore, such orders are not appealable immediately, but issues can be raised in an appeal after the trial's conclusion.

[21] Thus, based on all the cases referred to above, the respondent submits that the Magistrate does not possess the authority to acquit without H evaluation of the prosecution's evidence.

Appellant's Submission

[22] As I have stated earlier in this judgment, the application before the Magistrate by the appellant for DAA was pursuant to s. 254 of the CPC and not under s. 173 of the CPC. The appellant contends that the Magistrate's I reliance on *Ahmad Zubair Hj Murshid v. PP* [2014] 9 CLJ 289; [2014] 6 MLJ 831; [2014] 6 MLJ 831; [2015] 1 AMR 105, was a misdirection because it

did not pertain to s. 254. Further, the appellant contended that the Magistrate erred in the application of the principles from the recent Federal Court case in *Vigny Alfred* (*supra*), which is relevant to the issue at hand.

Decision Of The Court

[23] Section 173(g) of the CPC allows Magistrates to discharge an accused if the charge is considered groundless at any stage before the case's conclusion, but it doesn't equate discharge with acquittal. *PP v. Zainuddin & Anor* (*supra*) is the authority for the proposition, where the Supreme Court states:

> In view of what we have said above, our answer to the question raised in this reference is that in a summary trial, paragraphs (c) and (f) of s. 173 of the CPC do not empower the court to order a discharge amounting to an acquittal of an accused person without hearing evidence of the prosecution in support of its case.

[24] Section 254 of the CPC is concerned with scenarios where the court may discharge an accused, and this discharge can amount to an acquittal if the prosecution is not prepared to proceed. This provision grants the court discretion to end the case in favour of the accused without the need for a full trial, particularly in situations where the prosecution lacks readiness or evidence to support their case against the accused. This is a significant distinction from s. 173(g) of the CPC, emphasising the statutory provision for protecting the accused's rights against undue delays or lack of evidence in prosecution.

[25] The High Court and the Court of Appeal in *Vigny Alfred* case was of a different view that s. 254 of the CPC could only be applied after the prosecution had led evidence or called witnesses. However, on appeal to Federal Court, Justice Mary Lim, favoured the interpretation that s. 254 of the CPC actually applies from the moment the charge is read and explained to the accused, and they plead to it. This is what Her Ladyship Justice Mary Lim said in *Vigny Alfred* (*supra*):

> [34] Pursuant to s. 178 of the CPC, trial commences when the charge is read and explained to the accused and he is asked whether he is guilty of the offence charged or he claims to be tried. This was explained in *Public Prosecutor v. Marwan bin Ismail* [2008] 3 MLJ 51 citing *Perumal v. Public Prosecutor* [1970] 2 MLJ 265. See also Srimurugan Alagan in *The Criminal Procedure Code: A Commentary with Appellate Practice & Procedure*, p 357 para 254-4. Thus, contrary to the views of the High Court and the Court of Appeal, s. 254 operates and is an available option the moment the charge is read and explained to the accused and the accused pleads to the charge. Section 254 is not at all dependent on evidence being first led by the prosecution or any witness called to testify. Section 254 remains an available option throughout the trial, is available at any stage of the trial, and it may be invoked so long as judgment has not been delivered – see *Public Prosecutor v. Lee Chan Sang* [1989] 1 MLJ 224

[26] For the purposes of this appeal, regardless of whether I adopt Justice Mary Lim's interpretation that DAA is the default order prescribed under s. 254, or the majority interpretation preferred by Justice Zabariah Yusof (FCJ), which is, discharge shall not amount to an acquittal unless the court so directs. In the circumstances of this case and bearing the injustice to the appellant dictates that DAA is the proper order.

[27] Drawing upon Justice Zabariah Yusof's insights, it is clear that the discretion vested in the court by s. 254(3) of the CPC must be exercised judiciously based on the circumstances surrounding each case. According to Justice Zabariah Yusof, the plain and literal reading of s. 254(3) suggests that any discharge granted by the court under this section inherently does not amount to an acquittal, unless the court specifically directs otherwise for it to constitute an acquittal. Her Ladyship clarifies that the onus is on the court to explicitly state if a discharge is to be considered as an acquittal. Therefore, Her Ladyship disagrees to a default position where the discharge, in the absence of such a direction, amounts to acquittal. In other words, the full quorum of the Federal Court in *Vigny Alfred* (*supra*) are in agreement that s. 254(3) of the CPC does not fetter the discretion of the court in directing an order for DAA, if circumstances warrant it. Accordingly, so the Federal Court in *Vigny Alfred* (*supra*) ordered DAA in substitution for DNAA.

Circumstances Warranting DAA

[28] The inadequacy and lack of thoroughness in the investigation for nine months after the submission for representation was never completed. During this period, numerous adjournments were sought by the prosecution. Despite the Magistrate grudgingly allowing the adjournment with stern direction that on the next date the trial must begin, the prosecution never was ready. The appellant referred to the case of *Raqeem Rizqin Enterprise & Yang Lain lwn. Ketua Polis Negara & Satu Lagi* [2019] 8 CLJ 41 to show the importance of a fair and thorough investigation for the accused, and further referred to the case of *PP v. Tan Kim San* [1980] CLJU 66; [1980] 1 LNS 66; [1980] 2 MLJ 98 to buttress their contention that charges should only be brought after the prosecution have completed the investigation with sufficient evidence. What the prosecution had was a premature charge, without a thorough investigation, leaving them in a prolonged state of uncertainty.

[29] There is also the prosecution's lack of preparedness for trial, this is evident from the absence of any witnesses, including the complainant, on the trial dates. Despite the Magistrate's stern directive to start the trial, the Prosecutor repeatedly requested further adjournments, citing new facts from the appellant's representation that needed additional investigation, which was unjustified. The lack of readiness and repeated postponement requests or a 'DNAA' order were unwarranted. The case of *PP v. Mohamed Said* [1982] CLJU 115; [1982] 1 LNS 115; [1984] 1 MLJ 50 states the necessity of

having evidence ready and available at trial. Section 254 of the CPC, is also relied on in that case, asserting that the court is empowered to decide whether a discharge should amount to an acquittal, especially in cases where the prosecution is not ready to proceed. I agree with the appellant that the circumstances in present case warrants an acquittal.

[30] Other than the circumstances already stated above, this case warrants acquittal because of the impact the charge has had on the appellant's life. The appellant, being charged without proof of guilt, has caused himself and his family considerable mental distress, compounded by the financial burden of defending against the charge. The appellant cites the case of *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199 to illustrate the significant consequences of being charged, and even more so, of being re-charged. The extent of loss and suffering includes damage to reputation, emotional distress, and disruption to work and family life. The appellant, a Government doctor with a family, has fully cooperated with the investigation and has endured over two years of hardship trying to clear his name, while the prosecution repeatedly sought adjournments for apparently the same reasons. In these circumstances, the court agrees with the submission of learned counsel for the appellant on the need for judicial scrutiny to prevent the arbitrary use of the criminal justice system and to minimise unnecessary suffering to the accused. In stating this, the court does not take lightly the interest of the complainant; the speedy disposal of the trial and justice being served are the court's paramount considerations. This is precisely what the court aims to achieve by exercising its powers judiciously. It is important to remember that the appellant is innocent until proven guilty, and he has been cooperative and prepared to proceed with the trial to prove his innocence. In such circumstances, after enduring nearly two years of uncertainty and distress, the issuance of a DNAA order is a grave injustice to the appellant and does not change society's perception of his guilt. Lastly, the threat of being re-charged continues to loom over the appellant's head.

[31] Therefore, based on the majority reasoning by Justice Zabariah Yusof in *Vigny Alfred*'s case (*supra*) and the circumstances above presents a condition that warrants a DAA for the appellant. This decision is rooted in the understanding that the court holds the authority to determine the most appropriate order once the prosecution expresses a discontinuation of prosecution. This authority is exercised with the primary aim of upholding justice, ensuring the accused does not remain indefinitely under the cloud of an unresolved charge, and maintaining the integrity of the judicial process. It is aptly stated by Justice Mary Lim (FCJ) in *Vigny Alfred*'s case (*supra*):

> [81] I agree with that view. There should not have been a charge in the first place if the investigations were "still going on" or incomplete. It would be an aberration and a travesty on the administration of criminal justice if the courts were seen to condone a practice of charge now,

A investigate later. The prosecution's reason for a direction of DNAA under s. 254(3) borders on abuse and oppression that cannot be endorsed by the court. In effect, had this been a summary trial, it would have shown that the prosecution had a groundless case and the accused must be acquitted and discharged.

B **[32]** In the present case, it was submitted by the learned DPP that the situation in *Vigny Alfred*'s case is different. It is submitted that in the present case, the prosecution did not at any time express discontinuation of the charge against the appellant. I quote again a passage from the grounds of judgment by the Magistrate of what transpired on 14 October 2022, when the court ordered DNAA.

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> [4] Pada 14 Oktober 2022, peguambela tertuduh hadir dan bersedia untuk menjalankan kes bicara walaupun representasi mereka masih belum mendapat kata putus dari pihak AGC. Namun, TPR memaklumkan tidak bersedia untuk menjalankan perbicaraan kerana tidak sapina saksi dan tiada saksi yang hadir pada tarikh berkenaan. TPR masih memohon
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> D mahkamah memberikan penangguhan terakhir untuk jawapan representasi. Peguambela yang bijaksana telah berhujah memohon agar tertuduh dilepas dan dibebaskan (DAA) daripada pertuduhan selari seksyen 254 atau seksyen 173(f) Kanun Prosedur Jenayah (KPJ) memandangkan pihak pendakwaan tidak bersedia untuk perbicaraan
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> E disebabkan oleh siasatan yang belum selesai. **TPR membantah permohonan pembelaan dan masih memohon tarikh akhir untuk sebutan jawapan representasi ataupun tertuduh hanya dilepaskan tanpa dibebaskan (DNAA).**
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> (emphasis added)

F This passage clearly indicates that the prosecution was unable to proceed with the trial and sought further adjournments or, at a minimum, a DNAA. This behaviour implies a lack of intention to prosecute the case diligently. The repeated requests for adjournments, despite the Magistrate's stern directives to proceed, and the eventual request for a DNAA, connote that the

G prosecution is not ready to continue and effectively has no intention to prosecute the appellant at this time and during the past four adjournments sought by them. It is also clear from the grounds of judgment that the learned Magistrate had misinterpreted s. 254 of the CPC. Therefore, it is likely that even with many more adjournments, the Magistrate would not have ordered DAA. This reinforces the need for this court to order a discharge amounting

H to an acquittal to prevent further injustice and undue hardship to the appellant. Furthermore, such an order is necessary to avoid condoning the practice of "charge first and investigate later." This is precisely the reason why I am constrained to exercise the court's revisionary powers to order a DAA.

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[33] In *Koh Teck Chai v. PP* [1967] CLJU 72; [1967] 1 LNS 72; [1968] 1 MLJ 166; [1967] 1 MLRH 557, the court substituted the DNAA with DAA, and in doing so states:

> Held: the power enabling the discharge of the accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently demands that it be used. Our courts have consistently adopted the line that unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge hanging over him. In the circumstances of this case the order of the learned magistrate should be varied so that the discharge should amount to an acquittal.

[34] In *Sheila Sharon Steven Kumar v. PP* [2023] CLJU 2776; [2023] 1 LNS 2776; [2023] MLJU 3117, it was held that the Magistrate Court has jurisdiction under s. 254 of the CPC to issue either DAA or DNAA. Although art. 145 of the Federal Constitution grants the Public Prosecutor the power to manage proceedings, the court retains the authority to issue orders under s. 254 of the CPC. The court said:

> [20] Walaupun di bawah Perkara 145 Perlembagaan Persekutuan, Pendakwa Raya diberikan kuasa untuk memulakan, menjalankan atau memberhentikan apa-apa prosiding, ianya tidak bermaksud bahawa Mahkamah tiada kuasa untuk memberi Perintah berkenaan dengan di bawah seksyen 254 Kanun Prosedur Jenayah." *Sheila Sharon a/p Steven Kumar Iwn Pendakwa Raya* [2023] MLJU 3117.

Is Prosecutorial Discretion The Absolute Discretion Of The Public Prosecutor Under Article 145(3) Of The Federal Constitution?

[35] The respondent asserts that the prosecutorial discretion vested in the Public Prosecutor, who is also the Attorney General, is an absolute power under art. 145(3) of the Federal Constitution and s. 376 of the CPC. This power encompasses the initiation, direction, conduct, control, and discontinuation of any criminal prosecution, which can also be delegated to Deputy Public Prosecutors per s. 377(a) of the CPC. In *PP v. Zainuddin & Anor* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232; [1986] 2 MLJ 100, it was affirmed that the court cannot dictate when the prosecution must conclude its case, emphasising the Public Prosecutor's discretion. The respondent further argues that the Magistrate's decision to order DNAA without postponing the case was appropriate, as in the case of *Tan Chow Cheang v. PP* (*supra*), which held that a Magistrate should not discharge an accused without valid grounds and should allow for postponements if necessary. Further, *PP v. Syed Abdul Bahari Shahabuddin* [1975] CLJU 137; [1975] 1 LNS 137; [1976] 1 MLJ 87; [1975] 1 MLRH 177 clarified that a discharge under s. 254 of the CPC does not equate to an acquittal unless directed by the court, particularly when the prosecution faces temporary hurdles. Thus,

the respondent concludes that the Magistrate's order of DNAA was proper and aligns with the Public Prosecutor's constitutional and statutory powers, and preventing an unwarranted acquittal without a full trial.

Decision Of The Court

[36] Section 254 of the CPC allows the Public Prosecutor, under art. 145 of the Federal Constitution, the prosecutorial power to discontinue a criminal prosecution at any stage of the trial. This power was clarified by the Supreme Court in *PP v. Lee Chan Sang* [1989] 1 CLJ 144; [1989] 1 CLJ (Rep) 139; [1989] 1 MLJ 224. However, the court must then decide whether to discharge or acquit the accused, as outlined in s. 254(3). While the AG's decision to stop the prosecution influences the trial's course, the court retains the authority to make the final judicial order. The AG's role does not extend to influencing the court's decision on discharging or acquitting the accused, thus fortifying the court's judicial independence. This position was recently reiterated by the Federal Court in *Vigny Alfred*'s case (*supra*) and in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLJ 209, which is binding on this court. A passage from the decision in *Vigny Alfred*'s case (*supra*) by Her Ladyship Justice Mary Lim (FCJ) stating the current position is appended below:

> [27] Where the Public Prosecutor or the prosecuting officer declines to prosecute any further with the trial, which is already ongoing in court, s. 254 specifically provides for its consequence(s). Implicit in s. 254 is the power of the Public Prosecutor under art. 145 of the Federal Constitution to discontinue any criminal prosecution. This was explained by the Supreme Court in *PP v. Lee Chan Sang* [1989] 1 CLJ (Rep) 139; [1989] 1 CLJ 144; [1989] 1 MLJ 224:
>
> > Section 254 of the Criminal Procedure Code deals with the power of the Public Prosecutor to decline to prosecute further at any stage of the trial. After Merdeka this provision finds its basis in art. 145(3) of the Federal Constitution which provides that it is in the Attorney General's discretion to discontinue any criminal proceeding in the Civil Courts ...
>
> [28] Srimurugan Alagan in his *The Criminal Procedure Code: A Commentary with Appellate Practice & Procedure* (2nd edn, Sweet & Maxwell) opines that this "section merely amplifies the powers of the Public Prosecutor, namely, the power to discontinue a criminal prosecution", as provided in art. 145 of the Federal Constitution. This power to discontinue was also recognised in Hettiarachigae LS Perera with Harun J commenting that until the Attorney-General "makes up his mind the courts have to wait". I have no issue with that construct, in fact, that position of the law is generally correct.

[29] Where the Attorney-General as PP has made up his mind, the law has provided in s. 254 the consequences or orders that the court may make in response to such a decision. I would immediately dispel all misconception that any order made by the court as a consequence to being informed by the learned DPP that the AG/PP has decided not to continue with the prosecution, does not in any way amount to an interference of or impingement on, the AG's powers under art. 145 of the Federal Constitution. Such orders include an order discharging and acquitting an accused under s. 254.

[30] The powers of the AG as provided under art. 145 are not exclusive or absolute; nor are such powers immutable. This was observed by Eusoffe Abdoolcader SCJ in *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311; and lately echoed by this court in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLJ 209. The fact that the trial has already commenced should drive home this reality, that the conduct of criminal proceedings in court is very much the judgment and within the powers and jurisdiction of the court.

[31] Furthermore, in the matter of the type of order that a court should appropriately make in any given circumstances, no one including the AG/PP, has a right to dictate the prescripts or terms of the order. More so where the AG as PP is no longer interested in prosecuting the charge and short of a withdrawal of the charge by the AG, it must surely be a matter of judgment of the court as to what order should follow from such a vocalised choice. The AG is in no position to make a finding of guilt, let alone order a discharge or an acquittal. The parties, counsel and the AG may suggest and invite the court to consider certain terms but the power, discretion and jurisdiction to pronounce a judicial order ultimately and solely belongs to the court and we, judges, guard those mandates jealously as part of our constitutional oath. The High Court was thus in error when it reasoned that there will be an infringement of the AG's powers under art. 145 of the Federal Constitution if the court were to make an order of acquittal and discharge following the AG's intimation of disinterest in pursuing the charge in court.

[32] Returning then to s. 254, this provision envisages two scenarios where a trial may come to a premature end because the AG has made up his mind and as "Public Prosecutor has declined to prosecute further". First, under s. 254(1) where the prosecution is by the Public Prosecutor/PP (generally, this would be at the High Court); second, under s. 254(2) where the prosecution is by a prosecuting officer and such prosecution is before either the Sessions or Magistrates Court.

[33] Broadly, where the AG/PP informs the court of that decision, the trial is stayed and the accused is discharged from the charge. Where the decision is made by the PP, the stay of the trial is mandatory whilst in the case of a trial before the lower courts, stay is discretionary. This is readily discerned from the use of the term "may" in s. 254(2) as opposed to "shall" in s. 254(1).

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> [34] But, it is not the issue of stay that is the focus of my present deliberations; it is the issue of what is the effect of a discharge under either instance and what orders or directions the court should make when the AG/PP indicates that he will not further prosecute. For this, s. 254(3) specifically provides that "such discharge shall not amount to an acquittal unless the court so directs".

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[37] Since the position of the law is well established, the third issue must be also be answered in the negative to the extent that the court retains the authority to make the final judicial order.

Conclusion

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[38] In conclusion, I hold that under s. 254 of the CPC, the Public Prosecutor has the power to discontinue any criminal prosecution at any stage of the trial, as provided by art. 145 of the Federal Constitution. However, the ultimate authority to decide whether to discharge or acquit an accused lies solely with the court. However, this discretion must be exercised

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judiciously to prevent any injustice, particularly in cases where the prosecution is unprepared or delays unduly. Given the circumstances of this case where the appellant has suffered damage to reputation, emotional distress, and disruption to work and family life, this prolonged suffering and hardship for two years and above all the uncertainty faced by the appellant,

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this court finds it appropriate to order a discharge amounting to an acquittal substituting the order of the Magistrate Court, to uphold the principles of justice and judicial independence.

[39] I thank both counsels for their able submissions and invaluable assistance to the court.

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